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No. 07-113

In the Supreme Court of the United States

CITY OF CINCINNATI,

Petitioner,

v.

CLEVELAND CONSTRUCTION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Ohio Court of Appeals, First Appellate District

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED

Whether strict judicial scrutiny applies to a municipality's discretionary "lowest and best bid" determination that, as part of a non-exhaustive list of factors, includes permissive consideration of bidders' good faith outreach efforts to use minority-owned and women-owned subcontractors.

LIST OF PARTIES

Petitioner: City of Cincinnati

Respondent: Cleveland Construction, Inc.

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STATEMENT OF THE CASE

This case at bar concerns the lower courts' injunction granting Cleveland Construction's *facial* challenge barring the City from providing equal opportunity to participate in City subcontracts to minority-owned and women-owned businesses. The Brief in Opposition creates the erroneous impression that the challenged City of Cincinnati procurement system was *applied* to deny Cleveland Construction the Convention Center drywall bid. That did not happen. Instead, as the Court of Common Pleas held: "As applied in this case, however, those unconstitutional elements did not cause Cleveland to lose the contract award, rather, Valley was awarded the contract because of its higher SBE subcontracting percentage as calculated *without regard to race or gender.*"[1] The Court of Common Pleas further held:

> The trial elicited no testimony, however, that the City in fact gave weight to bidders' compliance with MBE or WBE availability estimates in making the contract award with regard to subcontracting percentages. Plaintiff failed to establish that City officials looked beyond whether drywall bidders met the City's 35% SBE [race and gender neutral small business] requirement . . . .The evidence indicates that the City awarded the contract to Valley, and not to Cleveland, because Valley's bid complied with the City's [race and gender neutral] requirement that 35 percent of the

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[1] App. 63 (emphasis added).

work go to small business enterprises and Cleveland's bid did not.[2]

Furthermore, the Court of Common Pleas emphasized: " . . . Cleveland has not established that the City's race and sex based classifications (as opposed to the City's small business preference) resulted in the loss of the contract award."[3] Nevertheless, the lower courts did prospectively enjoin operation of that part of the City's procurement system designed to provide equal opportunity to participate to minority-owned and women-owned subcontractors.

REASONS FOR GRANTING THE WRIT

I. The Equal Protection Question Presented in This Petition is the Question Left Unanswered in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (June 28, 2007).

In its Brief in Opposition, Cleveland Construction disregards the "lowest and best bid" character of the City's procurement system and instead focuses on the documentation, review, and anti-discrimination elements of the City's small business enterprise program.[4] Those

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[2] App. 70-71. It is uncontroverted that the small business requirement is race and gender neutral.

[3] App. 71-72.

[4] The Cincinnati Municipal Code sections providing for subcontractor outreach and for non-discrimination in purchasing and contracting were included in the Petition for Writ of Certiorari, pp. 2-11. The regulations authorized by the Municipal Code were provided in Cleveland Construction's Brief in Opposition, pp. 6-10.

elements are described by the Court of Common Pleas in its decision.[5] They effectuate the City's interest in providing minority-owned and women-owned businesses equal opportunity to participate in City contracts. Like the City's permissive consideration of the subcontractor outreach element described in the Petition for Writ of Certiorari, the purpose and effect of the documentation, review, and anti-discrimination provisions are simply to provide equal opportunity to participate. As explained in the Petition for Writ of Certiorari, the City's "lowest and best bid" procurement decision is based on permissive consideration of a non-exhaustive list of factors including contractors' good faith outreach efforts to use minority-owned and women-owned subcontractors.

Cleveland Construction's Brief in Opposition highlights the difference between the clear standard established in *Parents Involved in Community Schools v. Seattle School District No. 1*[6] ("racial classifications" resulting in *mandatory* government decisions based *solely* on race are subject to strict judicial scrutiny) and the lower courts' broader and vaguer subjection of the City's program to strict scrutiny. The regulatory provisions cited and quoted by Cleveland Construction do not result in a mandatory City decision based solely on race or sex. Rather, the regulations reasonably

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The regulations advance the ordinance objective of promoting equal opportunities for minority-owned and women-owned subcontractors by establishing documentation and anti-discrimination investigatory requirements. The regulations do not mandate the imposition of a government benefit or detriment based solely on race.

[5] App. 66-69.

[6] 127 S.Ct. 2738 (June 28, 2007).

provide minority-owned and women-owned businesses equal opportunity to participate in City contracts.

The Court of Common Pleas even held that "the law does not prohibit governmental entities from recording statistics relating to race or gender, or from tracking the progress of groups as identified by such categories, or from seeking to ascertain whether any impermissible, discriminatory barriers are hampering the advancement of individuals within groups as defined by race or gender."[7] The regulations reduce the likelihood of unlawful discrimination by contractors based on race or sex. In determining the "lowest and best bid," Cincinnati Municipal Code Section 321-37(c)[8] provides a non-exhaustive list of factors that permits, but does not mandate, consideration of compliance with any of the relevant regulations. The regulations do not mandate discrimination based on race or sex and, therefore, are not subject to the strict scrutiny equal protection standard expressed in the *Parents Involved in Community Schools* case.

II. The Strict Scrutiny Rule of *Adarand Constructors v. Pena* and the Federal Circuit Cases Cited Below Does Not Apply to a Discretionary, Non-Mandatory Municipal Outreach/Tracking Program Designed to Promote Equal Opportunities for Minority-Owned and Women-Owned Businesses.

Cleveland Construction erroneously asserts that the City's subcontracting outreach program is indistinguishable in its effects from the automatic race-based financial incentive

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[7] App. 65.

[8] App. 2-3.

program in *Adarand*.[9] The City concedes that "racial classifications" mandating government preferences based solely on race are subject to strict scrutiny. However, there is a fundamental difference between the "racial classifications" in *Adarand* that created automatic financial incentives in favor of only certain races and the City's subcontracting outreach program which does not.

Adarand involved the award of a United States Department of Transportation contract providing in part that the prime contractor "would receive additional compensation if it hired subcontractors certified as small businesses controlled by 'socially and economically disadvantaged individuals.'"[10] Adarand sought the subcontract for the guardrail portion of the contract and submitted the low bid, but the prime contractor instead chose to award the guardrail subcontract to another company certified as a small business according to the terms of the prime contract.[11] The prime contractor testified that Adarand's bid would have been accepted "had it not been for the additional payment it received by hiring Gonzales [the race-based certified small disadvantaged business subcontractor] instead."[12]

The incentive at issue in *Adarand* was automatically made available to those contractors who subcontracted with race-based certified small disadvantaged businesses, thereby creating a preference in the awarding of subcontracts in favor

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[9] Brief in Opposition, p. 23.

[10] *Adarand Constructors v. Pena*, 515 U.S. 200, 205 (1995).

[11] *Id.*

[12] *Id.*

of one group of subcontractors. By contrast, Cincinnati Municipal Code Section 321-37 does not provide an automatic financial incentive to subcontract with minority-owned and women-owned businesses. Rather, the City's ordinance creates two separate levels of discretion when awarding a contract and does not mandate an automatic financial incentive to contractors to use minority-owned or women-owned subcontractors. Cincinnati Municipal Code Section 321-37(a) requires that the City's purchasing agent award contracts to the lowest and best bidder. "Lowest and best" is a discretionary standard under Ohio law. Cincinnati Municipal Code Section 321-37(c) creates a further level of discretion by providing a nonexhaustive list of factors that *may* be used by the City's purchasing agent when determining the lowest and best bid. This Cincinnati standard does not mandate a certain result when awarding a public bid, unlike the situation in *Adarand* creating racial classifications virtually guaranteeing that the prime contractor would use a race-based certified subcontractor.

Adarand, as clarified by *Parents Involved in Community Schools*, essentially established that a mandatory government decision based solely upon a racial classification is subject to strict scrutiny. The federal circuit courts interpreting *Adarand* in the years preceding *Parents Involved in Community Schools* variously applied strict scrutiny both to governmental programs that were functionally equivalent to decisions mandated based solely upon race and to governmental programs that were not mandates. Cleveland Construction and the lower courts overbroadly misconstrued the holdings of the federal circuit court cases in relation to the case at bar.

For example, in *Lutheran Church-Missouri Synod v. FCC*,[13] the D.C. Circuit Court majority justified its conclusion that the FCC regulations were subject to strict scrutiny by reference to a mandate based solely on race: "*The imposition of numerical norms based on proportional representation—which is the core element to what are often referred to as affirmative action, set aside, or quota programs—is the aspect of the Commission's rule that makes it impossible for us to apply any standard of review other than strict scrutiny.*"[14]

In *Monterey Mechanical Co. v. Wilson*, a California statute required general contractors to either subcontract a certain percentage of their work to minority, women and disabled veteran-owned subcontractors or to demonstrate good faith efforts to meet this percentage.[15] Contractors who failed to meet this requirement would not be awarded state contracts.[16] In finding that this program was a racial classification subject to strict scrutiny, the *Monterey Mechanical* court noted that the "statute does not require set-asides, but it encourages them."[17]

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[13] 141 F.3d 344 (D.C. Cir. 1998), *petition for rehearing en banc denied*, 154 F.3d 487 (D.C. Cir. 1998).

[14] 154 F.3d 487 at 492 (emphasis added).

[15] 125 F.3d 702 (9th Cir. 1997).

[16] *Id.* at p. 710.

[17] *Id.* at p. 711.

In *Safeco Ins. Co. of America v. White House*,[18] the Sixth Circuit found that strict scrutiny applies where "outreach" "'indisputably pressures' contractors to hire minority subcontractors."[19] Under that ruling, if an outreach program does not mandate the government hiring of minority-owned firms, strict scrutiny does not apply.

In each of these cases, the program at issue either was functionally equivalent to a set-aside or contained certain components that effectively favored certain subcontractors over others. By contrast, the purpose of the City's program is to discourage discrimination and provide equal opportunities for all businesses to participate in the public contract process.[20] The program does not mandate set-asides, quotas, or any other type of affirmative action. Strict scrutiny is inapplicable to those situations in which a governmental program does not mandate decisions based solely on racial classifications. Furthermore, the City's promotion of equality

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[18] 191 F.3d 675 (6th Cir. 1999).

[19] *Id.* at 692.

[20] The City of Cincinnati's non-discrimination policy under Cincinnati Municipal Code Section 321-159 states in relevant part that "the policy of the City of Cincinnati [is] that its purchasing and contracting policies not implicate the City as a passive participant in discriminatory practices engaged in by private contractors or vendors who seek to obtain business with the City. In furtherance of these policy objectives, the City seeks to afford to its citizens *equal opportunities* to do business on City contracts and to ensure that all bidders . . . doing business with the City provide to businesses owned by racial minorities and ethnic minorities and women *opportunities to participate*, to the extent of their availability, on [City] contracts . . . ." Brief in Opposition App. 8b (emphasis added).

of opportunity and non-discrimination is functionally dissimilar to the programs subject to strict scrutiny identified in *Adarand*, *Parents Involved in Community Schools*, and the federal circuit court decisions relied upon by Cleveland Construction and the lower courts.

III. The Court Has Jurisdiction Under 28 U.S.C. §1257

In its Brief in Opposition, Cleveland Construction first concedes that "an order from the highest court of the State, in this case, the Supreme Court of Ohio, denying discretionary review is a final judgment that may be appealed to this Court . . . ." It then concludes that "there has not been a 'final judgment' within the meaning of 28 U.S.C. §1257."[21] The equal protection question presented in the Petition for Writ of Certiorari concerning the injunction issued by the lower courts is unrelated to the retrospective liability and damages issues pending in the Supreme Court of Ohio. Therefore, the order from the Supreme Court of Ohio denying its review of the equal protection question concerning the injunction is a final judgment within the jurisdiction of this Court. Alternatively, as requested in the Petition for Writ of Certiorari, the City requests that the Court remand for further consideration in light of the decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.

CONCLUSION

For the foregoing reasons, and as further discussed in the Petition for Writ of Certiorari, the Court should grant the petition. The Court should rule that, without subjecting themselves to strict judicial scrutiny, government entities may

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[21] Brief in Opposition, pp. 16-17.

provide equal opportunities for minority-owned and women-owned firms to participate in government contracts.

Respectfully submitted,

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